Subject Index

Page

Introduction 1

I

Because the doctrine of *in pari delicto* is a substantive doctrine of state law, the decision whether or not to retain it in California should be made by the state courts and not by this court 2

II

Petitioner's constitutional arguments are inapposite when applied to the case at bar 4

(a) The Equal Protection Clause of the Fourteenth Amendment (as incorporated in the Fifth) cannot be applied to impose conformity on the substantive law of the various states of the Union .. 4

(b) The refusal to hear this case by the California courts does not violate the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution 5

(c) Constitutional decisions on cruel and unusual punishment have imposed no limitations on the doctrine of *in pari delicto* as applied to the case at bar 5

III

Even assuming that a review of the doctrine of *in pari delicto* is in order and desirable at the present time, which respondent denies for the reasons set forth above, this is scarcely an appropriate case for a review of said doctrine because here there is no great disparity in the delictum of either party 7

Table of Authorities Cited

Cases	Pages
Berman v. Riverside Casino Corporation, 323 Fed. 2d 977 (9th Circuit 1963)	3
Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518	3
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	2, 3, 5
Perma Life Mufflers v. International Parts, 88 S. Ct. 1981	3
Powell v. Texas, 392 U.S. 514 (1968)	6
Robinson v. California, 370 U.S. 660 (1962)	6

Codes

California Penal Code:	
Section 330	7
Section 332	7
Section 337(a)	7

Constitutions

United States Constitution:	
Fifth Amendment	4, 5
Eighth Amendment	4
Fourteenth Amendment	4, 5

In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-183

RICHARD L. BRADLEY, *Petitioner,*

VS.

JAMES D. DOHERTY and Z. B. & M. ENTERPRISES, INC., dba THE ORCHID ROOM, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Preliminarily, respondents express their objection to the late filing of petitioner's Petition for Writ of Certiorari. Respondents further object to the various other procedural irregularities of said Petition, as they are described in petitioner's Motion to Allow Late Filing, including submission of the Petition in an improper printed form.

Without waiving its right to object to the aforementioned irregularities, respondents respond to the Petition for Writ of Certiorari as follows:

I

BECAUSE THE DOCTRINE OF IN PARI DELICTO IS A SUBSTANTIVE DOCTRINE OF STATE LAW, THE DECISION WHETHER OR NOT TO RETAIN IT IN CALIFORNIA SHOULD BE MADE BY THE STATE COURTS AND NOT BY THIS COURT.

The main thrust of appellant's brief attacks supposed inequities inherent in the doctrine of *in pari delicto.* The great energy spent in alleging that his gambling is a compulsion and that his turpitude is consequently less severe than that of respondent, might be of interest to the state courts, but this court is concerned only with constitutional aspects of this case which are a very subordinate part of petitioner's brief.

For this court to decide, for the supposedly equitable reasons suggested by petitioner, that the doctrine of *in pari delicto* should be rejected in California, would run squarely in the face of the judicial philosophy expounded by this court in *Erie Railroad v. Tompkins,* 304 U.S. 64 (1938), wherein this court rejected the concept of a uniform federal common law. The court quoted from Mr. Justice Holmes:

> " 'The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of the State existing by the authority of that State without regard to what it may have been in England or anywhere else . . .' "

> " 'The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.' " (304 U.S. at page 79, quoting from *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,* 276 U.S. 518, 532-536.)

Thus, the question as to whether or not the doctrine of *in pari delicto* is good law should not be considered here, but should be left in the hands of the California courts. In the case at bar, the California Supreme Court upheld what has long been the common law in California, and this should be dispositive of the matter.

Furthermore, in none of the federal cases cited by petitioner was the doctrine of *in pari delicto* rejected on Constitutional grounds. In *Berman v. Riverside Casino Corporation,* 323 Fed. 2d 977 (9th Circuit 1963) jurisdiction was based on diversity of citizenship and the substantive law of Nevada controlled. In that case plaintiff was not, as he is in the present case, involved in *illegal* gambling, but was gambling in a state-licensed casino. *Perma Life Mufflers v. International Parts,* 88 S. Ct. 1981 was also not decided on constitutional grounds. Suit there was brought in federal court alleging breach of the federal antitrust laws. Petitioner's constitutional arguments are, therefore, merely a smokescreen behind which he conceals a fundamentally unmeritorious claim.

II

PETITIONER'S CONSTITUTIONAL ARGUMENTS ARE INAPPOSITE WHEN APPLIED TO THE CASE AT BAR

The Fifth, Eighth, and Fourteenth Amendments to the United States Constitution have never previously been brought to bear on the issue of *in pari delicto* (appellant's brief, page 14) very simply because they have no bearing on the issue. Those Amendments expressly restrain government from interfering with citizens in certain ways; they in no way command that a state take affirmative action on behalf of any citizen. Here the refusal of the court to hear a civil action, which refusal is the direct consequence of the court's applying the doctrine of *in pari delicto,* merely leaves petitioner as the court found him. Quite contrary to having interfered with him, the state here has done nothing at all.

(a) The Equal Protection Clause of the Fourteenth Amendment (as incorporated in the Fifth) Cannot be Applied to Impose Conformity on The Substantive Law of the Various States of the Union.

Petitioner contends on page 3 of his brief that the decision of the California court, by placing itself in conflict with the laws of the states of Nevada, Kentucky, Missouri, Arkansas, Texas, Oklahoma, Louisiana, New York, and North Carolina, denies, thereby, to the citizens of California and of other states similarly situated, the equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution. The doctrine of *in pari delicto* is a doctrine of substantive state law and this plea to

enforce conformity with the substantive law of other jurisdictions, on the pretext of providing equal protection of the law, is tantamount to calling for a federally dictated, centralized body of substantive law. The equal protection clause has never previously been applied in this novel manner, and, to so apply it, would again violate the doctrine of *Erie Railroad v. Tompkins* as outlined above.

(b) The Refusal to Hear this Case by the California Courts does not Violate the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution.

Petitioner contends on pages 3 and 4 of his brief that the decision of the California court violates the due process of law guaranteed by the Fourteenth Amendment. His argument does not thereafter elaborate on this hypothesis and his theories thereunder are consequently unclear. No theory could, however, prevail because this court has never held that *inaction* on the part of a state, such as the refusal of the California courts to hear petitioner's case, can ever be arbitrary, capricious, or an abuse of discretion. This standard has heretofore been applied only to affirmative state legislative or administrative acts.

(c) Constitutional Decisions on Cruel and Unusual Punishment have Imposed no Limitations on the Doctrine of in pari delicto as Applied to the Case at Bar.

As petitioner's quotations abundantly illustrate, the cases upon which he relies deal only with the infliction of criminal punishment. The refusal of a court to hear a civil action can in no way be compared with the infliction of cruel and unusual punishment in a

criminal case, for, as noted above, the state has done nothing to petitioner other than to leave it as it found him.

Secondly, it is clear from *Powell v. Texas,* 392 U.S. 514 (1968) that neither it nor *Robinson v. California,* 370 U.S. 660 (1962) would make the punishment of gambling unconstitutional, even where the gambler was psychologically compelled to gamble. A clear distinction is made between punishing the doing of an act and punishing the "act" of merely being in a certain status. *Robinson v. California* held it unconstitutional to punish a person for being a drug addict; but the court did not object to making the *use* of narcotics by an addict illegal. It objected to the fact that "California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the state, and whether or not he has been guilty of any anti-social behavior there." 370 U.S. at 666. *Powell v. Texas* held that it was not unconstitutional to punish public drunkenness, even where the defendant was to some degree compelled to drink. In the opinion of the court, "Criminal penalties may be inflicted only if accused has committed some act, has engaged in some behavior which society has an interest in preventing . . ." 392 U.S. at 533. Furthermore, Justice Marshall for the court stated that this was the "entire thrust" of *Robinson,* as well. 392 U.S. 533.

As applied to the present case, it is clear that the state could not constitutionally punish a person for merely *being* a compulsive gambler, but that it could

punish him for engaging in gambling. Therefore, there is no constitutional limitation on the application of the doctrine of *in pari delicto* to this case.

III

EVEN ASSUMING THAT A REVIEW OF THE DOCTRINE OF IN PARI DELICTO IS IN ORDER AND DESIRABLE AT THE PRESENT TIME, WHICH RESPONDENT DENIES FOR THE REASONS SET FORTH ABOVE, THIS IS SCARCELY AN APPROPRIATE CASE FOR A REVIEW OF SAID DOCTRINE BECAUSE HERE THERE IS NO GREAT DISPARITY IN THE DELICTUM OF EITHER PARTY.

Petitioner maintains that his conduct constituted merely a violation of California Penal Code Section 330 which is a *misdemeanor,* while he maintains that respondent's conduct constituted a violation of California Penal Code Section 332, which is a *felony.* (Petitioner's brief, page 12). On page 2, line 1 of his Petition for a Writ of Certiorari, petitioner admits that the $70,000 he sought to recover was lost "in betting on the outcome of pinball games." Petitioner is therefore also in violation of California Penal Code Section 337(a), the violation of which is a *felony.* The Court of Appeal in its decision noted the applicability of California Penal Code Section 337(a) and based its decision in part on petitioner's violation of that section (see pages 5 and 8 of the Appellate Court decision, attached to petitioner's petition). Despite this fact, petitioner continues to avoid confronting the fact that the discrepancy between his

turpitude and that of respondent is more imagined than real.

For the reasons outlined above, respondents respectfully submit that petitioner's Petition for a Writ of Certiorari should be denied.

Dated, Redwood City, California,
August 15, 1973.

Respectfully submitted,
ROPERS, MAJESKI, KOHN,
BENTLEY & WAGNER,
A PROFESSIONAL CORPORATION,
By MICHAEL J. BRADY,
Attorneys for Respondents.

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court
OF THE
United States

Supreme Court, U. S.
FILED
AUG 30 1973
MICHAEL RODAK, JR., CLERK

OCTOBER TERM 1973

No. 73-183

RICHARD L. BRADLEY, *Petitioner,*

vs.

JAMES D. DOHERTY and Z. B. & M. ENTERPRISES, INC., dba THE ORCHID ROOM, *Respondents.*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EPHRAIM MARGOLIN,
445 Sutter Street, Suite 501,
San Francisco, California 94108,
Telephone: (415) 421-4347,

TRUCE, VEAL & JACKSON,
1710 Industrial Road,
San Carlos, California 94070,
Telephone: (415) 593-1871,

Attorneys for Petitioner
Richard L. Bradley.

PERRAN-WALSH PRINTING CO., 563 MISSION STREET - SAN FRANCISCO - CA 94105

Subject Index

Page

I. The present case is appropriate for a review of the doctrine of in pari delicto 1

II. Petitioner was a victim, not a mere participant. He is not suing on a gambling contract, but merely seeking restitution of money taken from him by fraud. This he would have been allowed to do at common law; he should be allowed to do so under the Due Process and Equal Protection clauses of the Federal Constitution 3

III. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution apply in this case 4

Table of Authorities Cited

Cases	Pages
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971)	6
Chicago Police Department v. Mosley, 408 U.S. 92, at 95 and 99 (1972)	6
Dufour v. Ackland, 1830, 9 L.J.K.B. p. 3	3
Dunn v. Blumstein, 405 U.S. 313 (1972)	6
Eisenstadt v. Baird, 405 U.S. 438 (1972)	6
Grim v. Cheatwood, 208 Okla. 570, 257 P.2d 1049 (1953)	3
Harris v. Bowden (1588) 78 Eng.Reprint 348	3
Humphrey v. Cady, 405 U.S. 504 (1972)	6
Jackson v. Indiana, 406 U.S. 715 (1972)	6
James v. Strange, 407 U.S. 128 (1972)	6
Katts v. Phelen, 2 How. 387, 11 L.Ed. 306	3
Reed v. Reed, 408 U.S. 71 (1971)	6
Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed. 830 (1967)	4, 5

Pages

Stanley v. Illinois, 405 U.S. 645 (1972) 6
Stewart v. Right (C.C.A. 8th) 147 F. 321 3

Wallace v. Opinham, 73 Cal.App.2d 25, 165 P.2d 709 (1946) 3
Webber v. Aetna Cas. & Sur. Co., 406 U.S. 1964 (1972) 6

Constitutions

United States Constitution:
Fifth Amendment 4
Eighth Amendment 4
Fourteenth Amendment 4

Codes

California Penal Code:
Section 332 2
Section 337(a) 1, 2
Section 489 2

Statutes

9 Anne, Chapter 14, Section 1 3

Texts

Bacon's, Abridgement, pp. 450 through 462 3

Digests

39 A.L.R. 2d 1213, at 1216, Annotation, entitled "Recovery of Money or Property Lost Through Cheating or Fraud in Forbidden Gaming, Gambling or Game" 3

In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-183

RICHARD L. BRADLEY, *Petitioner,*

VS.

JAMES D. DOHERTY and Z. B. & M. ENTERPRISES, INC., dba THE ORCHID ROOM, *Respondents.*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE PRESENT CASE IS APPROPRIATE FOR A REVIEW OF THE DOCTRINE OF IN PARI DELICTO

Respondents argue that this is not a proper case for the review of the doctrine of *in pari delicto* because, *inter alia,* Petitioner is in violation of California Penal Code §337(a), a felony.

Paragraph 337(a) of the California Penal Code provides that "every person" who engages in a prohibited list of activities, or any of them, is "punishable by imprisonment in the County Jail, for a period of not more than one year, or in the State Prison for a period not exceeding two years."

It is true that by the terms of California Penal Code Section 337(a) it applies to "every person", and accordingly, it was meant to apply to both parties. Indeed, if this statute alone were involved in the present case, the issue of *in pari delicto* would have been raised, in its pristine clarity. However, in the present case, §332 of the California Penal Code [via §489 of the California Penal Code] is also invoked. That section, sounding in fraud, calls for "not more than ten years of imprisonment in State Prison," and constitutes a separate enactment, aimed solely at the defrauding party.

It follows that in the present case, the California Legislature itself distinguished between treatment of those who are *in pari delicto,* under §337(a), and those who, in addition to engaging in a fundamentally similar activity of placing and receiving bets, engage also in an outright fraud. The Court below refused, however, to recognize the legislative enactment and chose to apply the doctrine of *in pari delicto* to any gambling activity even where one party to a game engages in an outright fraud. We contend that this decision, to apply the *in pari delicto* rule mechanically, is irrational. An irrational exclusion of the defrauded party from a reasonable opportunity of access to the courts and the protection of the law is not permissible under the Federal Constitution.

II. PETITIONER WAS A VICTIM, NOT A MERE PARTICIPANT. HE IS NOT SUING ON A GAMBLING CONTRACT, BUT MERELY SEEKING RESTITUTION OF MONEY TAKEN FROM HIM BY FRAUD. THIS HE WOULD HAVE BEEN ALLOWED TO DO AT COMMON LAW; HE SHOULD BE ALLOWED TO DO SO UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION.

At least since the adoption of the Statute of Anne [9 Anne, Chapter 14, Section 1; see 4, *Bacon's Abridgment,* pp. 450 through 462], the courts have refused to let the winner recover from the loser when the loser refuses to pay. A defrauded loser, however, was allowed to sue at common law, independently of the Statute of Anne, both before and after the Statute's adoption. See, *Harris v. Bowden,* 1588, 78 Eng. Reprint 348; *Dufour v. Ackland,* 1830, 9 L.J.K.B. p. 3.

In *Wallace v. Opinham,* 73 Cal.App.2d 25, 155 P.2d 709, and in the present case, the Supreme Court of California failed to consider and adopt this distinction, as established in the common law and as adopted by many other jurisdictions in the United States. See 39 A.L.R.2d 1213, at 1216, Annotation, entitled "Recovery of Money or Property Lost Through Cheating or Fraud in Forbidden Gaming, Gambling or Game." See, also, *Katts v. Phelen,* 2 How. 376, 11 L.Ed. 306; *Stewart v. Right,* [C.C.A. 8th], 147 F. 321, and *Grim v. Cheatwood,* 208 Okla. 570, 257 P.2d 1049 [in all of which a distinction was made between the cheating winner, and the non-cheating loser.]

Since the present case comes to this Court on a Demurrer, the issue raised herein centers on the right

of a victim of fraud to recover under the most aggravated of circumstances. In support of *in pari delicto,* California must show some rational justification for the rule where (1) organized crime is involved on one side of the gambling; (2) where the victim is helpless like a child; where the parties are not *actually in pari* of the delict. We submit that the State did not and could not carry the burden.

III. THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION APPLY IN THIS CASE.

In *Reitman v. Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed. 830 (1967), the Court considered a purportedly "neutral" provision of the California Constitution, intended to leave the State "uninvolved" vis-a-vis wholly private acts of racial discrimination in housing. The case involved a California Constitutional Initiative, which would have prohibited the State or any subdivision or agency thereof from denying, limiting or abridging directly or indirectly, the right of any persons willing or desirous of selling, leasing or renting, real property to decline to sell, lease, or rent such property to such person or persons as the prospective conveyor of real property in his absolute discretion chooses.

On its face, the measure merely denied potential plaintiffs access to the courts in cases of private housing discrimination. In the language of the Respondents' Brief in the present case, all California at-

tempted to do in the *Reitman* situation, was to "merely leave petitioner as the court found him." (See, Respondents' Brief, p. 4.) "Quite contrary to having interfered with him, the state here has done nothing at all." (Ibid.) This argument was rejected by both the California Supreme Court and by the United States Supreme Court. Both Courts found significant state involvement amounting to "State action" in the Initiative, which "encouraged" or "authorized" private discrimination.

In the present case, the Rule of *in pari delicto* is applied to bar access to the courts to individuals who, if allowed to, could show themselves not to be *in pari* with the hardened criminal. For the State to remain "neutral" in this situation is to lend State authority to exploitation of the ill by crime syndicates, by the powerful, the cunning and the vicious. It is "encouragement" and "authorization" and invitation to lawlessness. We can conceive of no rational state grounds for such action by the state.

The reference in the Opening Brief to "other jurisdictions" was not meant to suggest, as the Respondents argue in their brief, on page 4, "National conformity" in areas of substantive criminal law; it was meant to urge minimum standards for the right of access to the courts and it was meant to underscore the growing recognition in many states of the utter irrationality behind the rule of *in pari delicto.* We contend that it is as irrational to classify together the ill and the premeditating defrauder as it is to punish equally a child, enticed and submitting

to a sexual assault by an adult, and his molester. There is no rational basis to classify the two together and apply the rule of *"in pari delicto"*, where calculated fraud is perpetrated against a child-like, ill gambler.

Boddie v. Connecticut, 401 U.S. 371 (1971), striking down court fees in divorce actions by indigents, was decided on due process grounds. However, under the theory of equal protection, recent decisions of this Court suggest the same result. One recent equal protection test is whether "an appropriate governmental interest suitably furthered by the differential treatment" exists in the case. See, *Chicago Police Department v. Mosley,* 408 U.S. 92, at 95, and 99 (1972); *Webber v. Aetna Cas. & Sur. Co.,* 406 U.S. 1964 (1972); citing, *Reed v. Reed,* 408 U.S. 71 (1971); *Dunn v. Blumstein,* 405 U.S. 645 (1972); *James v. Strange,* 407 U.S. 128 (1972); *Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady,* 405 U.S. 504 (1972); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); and *Stanley v. Illinois,* 405 U.S. 645 (1972).

All these cases share in common the apparent unwillingness of this Court to accept un-meritorious claims of "rationality" by state legislatures in the face of state sanctioned denial of equality of treatment.

In each of these cases, arguments of a rational test were made and in each they were rejected as insufficient. In the present case, the California statutes specifically recognize the distinction between gambling

among equals and a fraudulent act by one of the gamblers. Otherwise, we would not have been dealing with two separate sections of the Penal Code of California. However, after the Legislature of California did recognize the distinction, the California Courts refused to qualify the doctrine of *in pari delicto* so as to make that doctrine inapplicable in cases of fraud. This, purely judicial construction of a doctrine never meant to apply in the most extreme factual situations of *non-in-pari* gambling, is supported neither by history, nor by policy, nor by common sense. We believe that closing access to the Courts indiscriminately, to all individuals involved in gambling, regardless of the degree of their involvement, regardless of their premeditation or illness, violates due process and equal protection clauses of the Constitution.

For the reasons outlined above, Petitioner respectfully submits that Petitioner's Petition for a Writ of Certiorari should be granted.

Dated, August 23, 1973.

Respectfully submitted,
EPHRAIM MARGOLIN,
TRUCE, VEAL & JACKSON,
Attorneys for Petitioner
Richard L. Bradley.